

STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

July 28, 2009

Opinion No. 09-132

Adjusting Wildlife Resources License and Permit Fees

QUESTIONS

1. Under Tenn. Code Ann. § 70-1-206(a)(7), will adjustment of any existing fee result in a recalculation of the consumer price index?
2. Will the implementation of a new fee result in a recalculation of the consumer price index?
3. If either does result in a recalculation of the consumer price index, from what date will that be triggered?

OPINIONS

1. Yes. The adjustment of an existing fee requires a calculation of the change in consumer price index to ensure that the percentage increase in total revenue generated by the fee does not exceed the percentage increase in the consumer price index.
2. No. New fees shall be established in such amounts as may be necessary to administer the provisions of the wildlife laws.
3. The adjustment of an existing fee requires a calculation of the change in consumer price index over dates that vary depending on whether the fee existed at the time of the enactment of Tenn. Code Ann. § 70-1-206(a)(7) and whether the fee has been previously adjusted.

ANALYSIS

1. Before March 9, 2004, the General Assembly set fees for wildlife resources permits and licenses. In 2004, the General Assembly amended wildlife resources law by authorizing the Tennessee Wildlife Resources Commission (“TWRC”) to promulgate rules and regulations both to adjust existing fees and to establish new licenses and permits for hunting, fishing and trapping, along with associated fees. In so doing, however, the General Assembly included a proviso tied to the consumer price index. The precise language of the statute in question (“the Amendment”), in pertinent part, authorizes the TWRC to:

Promulgate rules and regulations to adjust fees for licenses and permits in this title and to establish new hunting, fishing and trapping licenses and permits as deemed appropriate along with necessary fees. Adjusting or establishing fees shall be in such amounts as may be necessary to administer the provisions of the wildlife laws; provided, that the percentage increase in total revenue from a license package containing one (1) or more licenses or permits, or both, shall not exceed the percent of increase in the average consumer price index, all items – city average, as published by the United States department of labor, bureau of labor statistics, on the first day of March 1990, or, in the case of any permit, license or permit/license package fee adjustment after the initial adjustment under this subdivision (a)(7), the difference in the average consumer price index, all items – city average between the dates of one adjustment and any subsequent adjustment; provided, however, that individual fee adjustment amounts may be rounded up to the next dollar amount.

Tenn. Code Ann. § 70-1-206(a)(7).

The language of the Amendment has two principal parts as it relates to fees for licenses and permits. In the first part, the Amendment confers on the TWRC the general authority both to establish fees and to adjust fees. In the second part, the Amendment qualifies that authority with a two-pronged limitation. The first prong (“the initial adjustment clause”) speaks of a limitation based on the percentage increase in the consumer price index dating from March 1, 1990.¹ The second prong (“the subsequent adjustment clause”) speaks of a limitation based on the percentage increase in the consumer price index between dates of adjustment.²

The first question posed in this request asks whether the adjustment of an existing fee will result in a recalculation of the consumer price index. As we will discuss more fully below, the language of the Amendment is not entirely clear as to the precise manner of adjusting fees in relation to the consumer price index. It is, however, quite clear from the plain language of the Amendment, particularly the initial adjustment clause and the subsequent adjustment clause, that the adjustment of fees is tied in some way to changes in the consumer price index. *See* Tenn. Code Ann. § 70-1-206(a)(7). Thus, it is the opinion of this Office that the adjustment of an existing fee requires a calculation of the change in the consumer price index between relevant

¹ The initial adjustment clause ostensibly qualifies “adjusting or establishing fees” with the language, “provided, that the percentage increase in total revenue from a license package containing one (1) or more licenses or permits, or both, shall not exceed the percent of increase in the average consumer price index . . . as published . . . on the first day of March 1990.” Tenn. Code Ann. § 70-1-206(a)(7).

² The subsequent adjustment clause ostensibly qualifies “adjusting or establishing fees” with the language, “provided, that the percentage increase in total revenue . . . in the case of any permit, license or permit/license package fee adjustment after the initial adjustment under this subdivision (a)(7), [shall not exceed] the difference in the average consumer price index . . . between the dates of one adjustment and any subsequent adjustment.” Tenn. Code Ann. § 70-1-206(a)(7).

dates to ensure that the percentage increase in total revenue generated by the fee does not exceed the percentage increase in the consumer price index.³

2. The second question posed in this request asks whether the implementation of a new fee will result in a recalculation of the consumer price index. It is clear from the language of the Amendment that the TWRC has the authority “to establish new hunting, fishing and trapping licenses and permits as deemed appropriate along with necessary fees.” Tenn. Code Ann. § 70-1-206(a)(7). The question is whether the qualifications set forth in the initial adjustment clause and the subsequent adjustment clause apply to the establishment of fees.

Although the statutory language could be clearer, it is the opinion of this Office that the initial adjustment clause and the subsequent adjustment clause apply only to adjusting fees and not to establishing fees. While the plain language of the initial adjustment clause does not differentiate between “adjusting or establishing fees,” the language of the subsequent adjustment clause specifically references adjustment of fees and never references establishment of fees. Tenn. Code Ann. § 70-1-206(a)(7). Moreover, the language of the subsequent adjustment clause refers to the procedure set forth in the initial adjustment clause as “the initial *adjustment* under this subdivision (a)(7).” Tenn. Code Ann. § 70-1-206(a)(7) (emphasis added). Thus, the statutory language suggests that the establishment of a new fee is not tied to the consumer price index.

Furthermore, in our view, the consumer price index bears no proper relationship to the establishment of fees for new licenses and permits. The consumer price index is an inflationary-type measure more appropriate for adjusting fees to account for the change in cost for goods and services over time. It is not as well-suited for the purpose of establishing new fee amounts on the front end.

Lastly, we discern no legislative intent from the committee hearings and floor sessions to specifically link the establishment of fees to the consumer price index. In contrast, there are multiple comments during the legislative process that clearly evidence an intent to link the adjustment of fees to the consumer price index. It is therefore the opinion of this Office that the establishment of new fees is not tied to the consumer price index and is instead guided by the statutory language that it be “in such amounts as may be necessary to administer the provisions of the wildlife laws.” Tenn. Code Ann. § 70-1-206(a)(7).

³ The first question asks whether the adjustment of “any existing fee” will result in a recalculation of the consumer price index. The use of “any” might also suggest a question as to whether the adjustment of one fee resets the calculation dates of the consumer price index for a fee not specifically included in the adjustment. In our view, fee adjustments must be considered on an individual basis. In other words, the fact that one fee was adjusted one year ago does not mean that adjusting another fee, which was not adjusted at the same time, is tied to the change in the consumer price index over the past year. It makes little sense to limit a fee adjustment for a fee that might not have been adjusted for many years to the change in the consumer price index over the past year simply because a different fee was adjusted a year ago. Put another way, however, the question becomes whether fee adjustment must be done in wholesale fashion or may be done on an individual basis. In other words, must all fees be considered for adjustment at one time (regardless of whether all fees are actually adjusted in any amount), or may a single fee be adjusted without regard to other fees. The language of the Amendment, in referencing “one (1) or more licenses or permits,” suggests that fee adjustments may be individual. See Tenn. Code Ann. § 70-1-206(a)(7). Moreover, we note that nothing in the legislative history of the Amendment explicitly indicates that the General Assembly contemplated a requirement that fee adjustment must be wholesale.

3. The third question posed in this request asks what dates must be used in calculating the change in the consumer price index. As alluded to above, the statutory language in this regard does not tell the whole story. On the surface, the matter is relatively straightforward. The initial adjustment clause requires calculation of the change in the consumer price index between March 1, 1990, and the date of the initial adjustment. The subsequent adjustment clause requires calculation of the change in the consumer price index between adjustment dates. In our view, however, the matter is more complicated than the language of the Amendment would make it appear.

The legislative history of the Amendment yields some guidance on this issue. In 2004, at the time the General Assembly was considering what would become section 70-1-206(a)(7), it had been approximately fourteen years since the legislature had adjusted license and permit fees. During committee hearings and floor sessions, members of the General Assembly voiced general agreement that such fees were due for an increase. In that vein, there was specific mention of the fact that the Tennessee Wildlife Resources Agency (“TWRA”) was funded solely by such fees, and the lack of a fee increase for such a long period of time, coupled with the increasing cost of goods and services over that period of time, left TWRA facing severe cutbacks if a fee increase or some other funding solution were not effected.

The solution reached by the General Assembly was to place the power to adjust existing fees with the TWRC through its rulemaking authority. Comments during committee hearings revealed that the first adjustment of an existing fee under this new authority needed to be significant and, in fact, was likely to be so given the length of time it had been since the last fee increase. Given that the statute was enacted in March 2004, it appears that the fourteen-year period without a fee increase is the source of the statutory language that “the percentage increase in total revenue from a license package containing one (1) or more licenses or permits, or both, shall not exceed the percent of increase in the average consumer price index, all items – city average, as published by the United States department of labor, bureau of labor statistics, *on the first day of March 1990.*” Tenn. Code Ann. § 70-1-206(a)(7) (emphasis added). There were comments during committee hearings indicating that the anticipated first adjustment of certain existing fees, although significant, would not exceed the change in the consumer price index since March 1990.

Against this background, it makes little sense to link the first adjustment of a fee that was established after the Amendment to the change in the consumer price index starting in March 1990. Fees established after the Amendment do not suffer from the same problem as fees that existed at the time of the Amendment, namely that they had not been adjusted for approximately fourteen years. Presumably, it was this problem that led to the use of the March 1990 date as the starting point for the first adjustment of existing fees. Accordingly, although not clearly indicated by the language of the Amendment, it is the opinion of this Office that, in calculating the change in the consumer price index for purposes of adjusting fees, a distinction must be made between those fees that were in existence at the time of the Amendment and those fees that were established after the Amendment.

With regard to the category of fees that were in existence at the time of the Amendment, the plain language of the Amendment details the manner in which to calculate the change in the

consumer price index. The first adjustment of such a fee would be limited by the change in the consumer price index from that published on March 1, 1990, to that published at the time the fee adjustment is proposed as reflected in the Notice of Rulemaking Hearing.⁴ In other words, the starting point for examining the change in the consumer price index would be the published rate as of March 1, 1990, and the ending point would be the published rate as of the date the fee adjustment is proposed as reflected in the Notice of Rulemaking Hearing.⁵ Subsequent fee adjustments would be limited by the change in the consumer price index from the date used as the ending point in the immediately prior adjustment to the date of proposal of the current fee adjustment.

With regard to a fee established after the Amendment, the first adjustment is limited by the change in the consumer price index from that published as of the date the fee was established to that published as of the date the adjustment is proposed as reflected in the Notice of Rulemaking Hearing. Subsequent adjustments would operate in the same manner as those for a fee that existed at the time of the Amendment. In other words, subsequent adjustment of a fee established after the Amendment would be limited by the change in the consumer price index from the date used as the ending point in the immediately prior adjustment to the date of proposal of the current fee adjustment as reflected in the Notice of Rulemaking Hearing.

ROBERT E. COOPER, JR.
Attorney General and Reporter

⁴ We recognize that the process of adjusting fees, given that it occurs through rulemaking, necessarily covers a span of time. There will be time gaps between when the TWRA proposes a fee adjustment, when public hearings occur on the proposed rulemaking, when the TWRC votes to promulgate the fee adjustment rule, when this Office reviews the rules for legality, when the rules are filed with the Secretary of State, and when the rules become effective. Obviously, at the time a fee adjustment is proposed, it will be impossible to predict what the consumer price index will be at some point in the future. Should the consumer price index decline after a fee adjustment is proposed, it is possible that the fee adjustment, upon becoming effective, may actually exceed the consumer price index limit set forth in the Amendment. In our view, however, the best approach involves using a known value when effecting a fee adjustment. Moreover, it bears noting that the Amendment itself, in its language that “individual fee adjustment amounts may be rounded up to the next dollar amount,” contemplates that a fee adjustment may actually exceed the consumer price index limit in the statute. *See* Tenn. Code Ann. § 70-1-206(a)(7).

⁵ It is our understanding that the consumer price index is typically published on a monthly basis. It is our further understanding that, given the time associated with compiling and analyzing raw data, the index published each month actually relates to a past date. Thus, the index published as of March 1, 1990, actually reflects the cost of goods and services at a time in the near past. The language of the Amendment is clear, however, that the appropriate measure is the index published as of March 1, 1990, rather than the index for March 1990. The same approach should apply with respect to the date the fee adjustment is proposed.

MICHAEL E. MOORE
Solicitor General

R. STEPHEN JOBE
Senior Counsel

Requested by:

Ed Carter
Executive Director
Tennessee Wildlife Resources Agency
Ellington Agricultural Center
P.O. Box 40747
Nashville, TN 37204